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No. 742

In the

Supreme Court of the United States

OCTOBER TERM, 1957

MINNIE FRANKLIN,

Petitioner,

v.

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

1. There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

2. Conflict of decisions of Court of Appeals in opinion with state court decisions of the Supreme Court of Oklahoma on nonfederal questions in violation of the Rule and the law as announced by the Supreme Court of the United States in *Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.*

3. The judgment of the District Court for the Eastern District of Oklahoma and the opinion of the Circuit Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

4. The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

STATEMENT OF THE CASE

Being unable to concur with petitioner's Statement of the Case, we submit the following:

Respondents were the plaintiffs in the trial court and won a favorable verdict and judgment which was affirmed in the Court of Appeals, except as to one of the plaintiffs, there being a remand as to her solely on the question of her damages not being supported by expert medical testimony. Therefore, these Respondents are entitled to have the facts reviewed in a light favorable to them.

This is an automobile collision case, the accident taking place on a national highway about one-half mile outside the city limits of Ardmore, Oklahoma, on a clear day shortly after noon. Respondent Shelton was driving his station wagon, accompanied by his family as passengers, in a Northerly direction at a speed estimated by two disinterested witnesses at from 35 to 45 miles per hour (R. 53, 88) in an area where the speed limit was 65 miles per hour (R. 89). The statement is made by Petitioner in her brief that the area involved was a business district, a matter which was struck from her trial pleading on Motion by Respondents, and this point is not before this Court.

Contrary to the Statement by Petitioner the station wagon did not suddenly come over the crest of a hill. It was visible for a distance of 900 measured feet from the point where the accident occurred according to the Highway Patrolman's actual measurement (R. 88). At most there was only a silght rise in the highway at some distance from the point of impact (R. 387, 389). The collision occurred in Respondents' lane of traffic (R. 52).

Petitioner states that she drove her Cadillac to her right-hand side of the road, waited and then crossed when there was no traffic near enough to constitute an immediate hazard. Respondents' testimony was to the contrary, as well as the testimony of a disinterested bus driver who had been following the station wagon for several miles, watching its speed as well as the roadway, and this testimony showed that Petitioner slowed her car and then turned across the

highway into Shelton's lane of traffic, without giving any signal whatever, and at a time when he could not avoid her by the use of any means at hand. Taking Petitioner's statement at face value, as a matter of law, she did cross the road when there was an immediate traffic hazard, and if she did look up and down the road, she looked without seeing.

As to statements made by Petitioner with regard to the charge of the trial court, we believe the Court's Charge constitutes the best evidence that it was full and fair to all parties alike (R. 350 to 359).

Finally, petitioner's statement that respondents J. D. and Venera Shelton were crying before the jury without provocation is entirely unsubstantiated by the record, which shows that only J. D. Shelton was crying after looking at a picture of his station wagon and while telling about trying to rescue his family from the wreckage (R. 226, 228). This action certainly was not unnatural on his part in view of the permanent and serious injuries inflicted upon himself and his family by the carelessness of the defendant petitioner.

RESPONDENTS' PROPOSITIONS

1.

There is no conflict of decisions between the Courts of Appeals as to construction of Rules 51 and 46, Federal Rules of Civil Procedure as applied to the facts of the instant case.

2.

There is no conflict of decisions between the Court of Appeals and the Supreme Court of Oklahoma as to the substantive law of this case.

3.

The trial court's conduct of the case was fair in every way and petitioner was denied none of her constitutional rights (In reply to Petitioner's Questions Presented Numbers Three and Four).

PROPOSITIONS RESTATED

1.

There is no conflict of decisions between the Courts of Appeals as to construction of Rules 51 and 46, Federal Rules of Civil Procedure as applied to the facts of the instant case.

ARGUMENT

Petitioner cites one case which might be taken to be in support of her First Question Presented from the language quoted from it in the Petition (page 6). This case, *Montgomery v. Virginia Stage Lines, Inc., D. C., 191 F. 2d 770,* does show in the first part of the opioion that the court believes Rules 51 and 46 should be construed together and that probably a proposed instruction, apparently whenever presented to the trial judge, should be considered as an objection if it fairly brings to the judge's attention the

matter of which complaint is made. However, later on in the opinion the court backs away from this proposition and bases its holding on the ground that "fundamental error" was committed by the trial court not giving the particular charge, whether brought to his attention or not.

Since the decision finally hinged on "fundamental error," it is apparent there is no conflict of decision between that case and the one at hand. The Tenth Circuit Court of Appeals also applies the "fundamental error" doctrine in an applicable case. See *Smith v. Welch, 10 Cir., 189 F. 2d 832; Allen v. Nelson Dodd Produce Company, 10 Cir., 207 F. 2d 296; Kanatser v. Chrysler Corporation, 10 Cir. 199 F. 2d 610, Certiorari denied, 344 U. S. 921, 73 S. Ct. 388, 97 L. Ed. 710.*

Rule 46, Federal Rules of Civil Procedure, modifies the previous practice requiring formal exceptions to rulings or orders of the court but we emphasize this particular rule REQUIRES "that a party at the time the ruling or order of the court is made or sought, make known to the court, the action which he desires the court to take or his objection to the action taken and his grounds therefore."

The sequence of action in this particular case in the trial court is shown by the record; it reflects that the jury had retired before any objections were made by petitioner's attorney to the charge, and before the proposed instructions were submitted to the trial judge. Also, it further appears from examination of the record that petitioner's attorney

made no exception or objection to the failure of the trial judge to charge as requested by him at such time as the instructions were refused. (R. 375 to 384.) It therefore conclusively appears that the requirements of Rule 46 were not met in any particular, thus laying to rest any argument as to whether or not petitioner's attorney had properly brought his complaints to the trial court's attention.

Among the cases cited by petitioner in support of her First Proposition are *Wright v. Farm Journal, Inc., 2 Cir., 158 F. 2d 976* and *Williams v. Powers, 6 Cir., 135 F. 2d 153*. In the *Wright* case, although the court says that Rules 51 and 46 should be construed together, it further appears that the particular instruction was presented at the proper time, that is, before the jury retired. The *Williams* case powerfully supports respondents' position instead of petitioner's, as the court says *(135 F. 2d 157)*:

> "The record shows that appellant requested charges but the record is barren of any objection or exception appellant made to the court to charge as requested. Under the express provisions of Rule 51 of the Rules of Procedure, supra, appellant is prohibited from urging the error, if any. Reeve Bros. v. Guest, 5 Cir., 131 F. 2d 710."

The Court of Appeals for the Tenth Circuit has decided the same question now presented many times, and presumably on one occasion the same question from the same court has been ruled on by the Supreme Court of the United States. This case held that if exceptions to the charge were made after the jury retired, they could not be considered

and the failure to present in time concluded the matter. See *Kanatser v. Chrysler Corporation, 10 Cir., 199 F. 2d 610, Certiorari denied, 344 U. S. 921, 73 S. Ct. 388, 97 L. Ed. 710.*

With the action taken by this Court on the last cited case, plus a long line of authority establishing the same principle by the same Tenth Circuit Court of Appeals, it appears litigants would feel safe in following the same procedure. See *Hayes v. United States, 10 Cir., 238 F. 2d 318; Allen v. Nelson Dodd Produce Company, 10 Cir., 207 F. 2d 296; Smith v. Welch, 10 Cir., 189 F. 2d 832;* and *Thiringer v. Barlow, 10 Cir., 205 F. 2d 476.*

We submit the lower courts were correct in their rulings on this matter.

2.

There is no conflict of decisions between the Court of Appeals and the Supreme Court of Oklahoma as to the substantive law of this case.

ARGUMENT

Petitioner cites only two Oklahoma cases dealing with "assured clear distance ahead," being *Vammen v. Kinsey, 181 Okl. 92, 72 P. 2d 497* and *Whitney v. Douglas, ___ Okl. ___, 307 P. 2d 154.* These cases concern the driver's inability to be able to stop within range of his headlights when the object collided with was in his lane of traffic.

This "range of headlights" rule is followed in several jurisdictions, but regardless of its merits it has no application to the facts of this case, as this collision happened in broad daylight, on a clear day, and petitioner was not in respondent Shelton's lane of traffic until immediately before the collision.

Petitioner cites no Oklahoma case which requires a legal definition of "assured clear distance ahead" and we find none. The trial court was correct in presenting the defense of "assured clear distance ahead" pleaded by petitioner but was certainly justified in adding:

> "However, you are further advised that in connection with Mr. Shelton's duty to drive so as to be able to stop within the assured clear distance ahead such does not mean that he had an absolute duty to drive in such a manner as to be able to stop and avoid any type of impact under any condition. Whether the plaintiff, Mr. Shelton, was driving so as to be able to stop within the assured clear distance ahead must be determined by you as a matter of fact from all the evidence; and, in this regard you are entitled to consider another applicable law which gives a driver, such as Mr. Shelton, the right to assume that others will use the highways lawfully, in determining his speed and ability to stop within the assured clear distance ahead."

By this latter language the trial court recognized a rule of law based on good sense and reason that a driver is not under an absolute duty to be able to stop and avoid any type of impact under any condition, and that Shelton had a right to assume Mrs. Franklin would use the highway

lawfully. The principle laid down in the charge has been previously recognized in the case of *Maragokis v. United States, 10 Cir., 172 F. 2d 393*, which held that the statutory duty to be able to stop in the distance the operator could see objects in the highway in front of him was not absolute. The court recognized that an area of discretion was allowed under conditions suddenly and unexpectly arising, when even with the exercise of due care, the driver could not avoid the collision.

There is an excellent discussion of this whole question in *Rogers v. Anchor Motor Freight, 95 Ohio App. 62, 117 N. E. 2d 451*, where many authorities are cited, but the majority holding is that there is no absolute liability under the statutory duty, and a jury issue is created when there appears some justification of not being able to stop even when in the exercise of due care. In the case at hand, this matter was submitted to the jury.

It does not appear that Petitioner has any other complaint against the charge with regard to the trial court not submitting her defenses. It seems that little complaint should be made on this issue since, as a matter of fact, respondents were entitled to a charge that a person turning left on a highway when not at an intersection is held to a "high" degree of care by the substantive law of Oklahoma. *See Highway Insurance Underwriters v. Nichols, 208 Okl. 242, 255 P. 2d 260.*

3.

The trial court's conduct of the case was fair in every way and petitioner was denied none of her constitutional rights (In reply to Petitioner's Questions Presented Numbers Three and Four).

ARGUMENT

At page 29 of her Petition for Writ of Certiorari, petitioner lists as causes for complaint (a) failure of the trial court to give proper instructions presenting her defenses and (b) the failure to instruct the jury what was meant by "assured clear distance ahead" and (c) the instruction that J. D. Shelton had the right to assume all persons would use the highway lawfully.

These contentions, we believe, have been adequately covered by our Argument under Propositions One and Two and will not be discussed further.

However, petitioner does advance the contention that the jury argument was not fairly conducted. The circumstances surrounding the jury argument show that both sides had thirty minutes to argue the case (R. 350). It was stated in open court that one of the plaintiffs' attorneys would open with a discussion of the liability features and the other would discuss the damages features. Since the plaintiffs had presented such a conclusive case of liability, in their opinion, then short shrift could be made of this subject, but there remained the task of putting before the jury the injuries of six people together with a discussion of the

voluminous medical evidence. The opening thus took only five minutes and the closing twenty-five minutes because of this situation. Petitioner's attorney did not object after all the arguments were in and did not ask for additional time to answer anything new in the plaintiffs' closing argument. We believe both the lower courts were quite correct in holding this matter to be within the discretion of the trial judge.

There is no Federal Rule of Civil Procedure governing jury argument in the trial court, and this has been a matter for the Federal District Judge's discretion since early times. We quote from *Florence Oil & Refining Co. v. Farrar, 8 Cir., 1901, 109 F. 254, 257:*

> "It is well settled in the courts of the United States that the determination of the right to open and close a case rests largely in the sound discretion of the trial court. Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; Hall v. Weare, 92 U. S. 728, 23 L. Ed. 500; Day v. Woodworth, 13 How. 363, 14 L. Ed. 181."

In *United States v. Grannis, 2 Cir., 1949, 172 F. 2d 207, certiorari denied, 337 U. S. 918, 69 S. Ct. 1160, 93 L. Ed. 1727*, the court held the Federal District Court is under no obligation to follow the procedural method of the state courts. Even in the extreme situation where defendant, who had the burden of proof on the whole case, waived opening argument and used his entire argument time after the plaintiff had closed, it has been held the matter of jury argument is entirely within the sound discretion of the trial

judge. See *Purington Paving Brick Co. v. Metropolitan, 8 Cir., 4 F. 2d 676.*

It appears from the cited cases and these facts that the lower courts have correctly decided the issue as to jury argument.

There remains one final contention on the part of petitioner in which she challenges the refusal of the trial court to grant a mistrial on account of the plaintiffs J. D. and Venera Shelton weeping during the trial. The fact that Venera Shelton wept is not in the record, this being merely the version of petitioner's attorney (R. 228, 229).

In any event, control of the trial is and should be in the hands of the trial court, absent the abuse of discretion. The overwhelming weight of American authority is to the effect that if a demonstration in court by the plaintiff or one of his witnesses is only of weeping, then this furnishes no basis for granting a new trial. We quote from *66 C. J. S. 127, Sec. 35*, which reads in part:

> "On the other hand, the fact that there was an emotional demonstration in court by the prevailing party or his relatives does not necessarily demand a new trial, and under the circumstances disclosed in particular cases it has been held no grounds for new trial that he or they became ill in the presence of the jury, cried, fainted, or relapsed into hysteria."

See also *39 American Jurisprudence 107; 57 A. L. R. 62*, and *Wiggins v. Sterne, Okl. 293 P. 2d 603, 606.*

Even though petitioner has raised the question of her constitutional rights for the first time in this Court, we

believe the record of this case is the strongest sort of evidence that none were violated, whether or not they were raised in the lower courts. The Constitution only guarantees petitioner a fair trial and not the results of the trial.

CONCLUSION

We submit there is no conflict of decision between the decision of the Court of Appeals in this case and any other case, it being a case where the petitioner submitted her case to a jury and lost. As to the merits, the respondents made out an almost conclusive case of liability and the amount of their damages have not been questioned in this Court.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been mailed to opposing Counsel of Record with proper address and sufficient postage, this 3 day of February, 1968.

Howard S. Smith

HOWARD S. SMITH